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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN, - - - - - - - - - - - - Petitioners,

versus

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON, - - - - - Respondents,

versus

THAD C. McCANSE, Guardian ad litem, - - - Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

BRIEF OF FREE SPEECH ADVOCATES AND CHRISTIAN ADVOCATES SERVING EVANGELISM AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the United States Constitution require a state to adopt the controversial doctrine of substituted judgment in order to authorize court-appointed guardians to cause the death of their incompetent and dependent ward by denying her food and water when there exists no clear and convincing evidence of her intent?

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INTEREST OF AMICI

Free Speech Advocates (FSA) is a legal defense project that exists to secure the First Amendment rights to engage in religious witness, peaceful sidewalk counseling, and protest of or conscientious objection to the destruction of unborn human life. Free Speech Advocates endeavors to assure a proper and competent defense, due process, and all constitutional rights to those who take a stand against abortion.

Christian Advocates Serving Evangelism (CASE) is a legal defense organization dedicated to protecting, preserving and defending the right to proclaim the Gospel of Jesus Christ in public places.

Amici FSA and CASE recognize the value of fidelity to constitutional principles and the dangers of adjudication based upon subterfuge and false premises. The substituted judgment doctrine — which authorizes third parties to exercise the subjective decision-making power of those who lack the capacity to make choices — represents a betrayal of the constitutional rights of incompetent persons. Amici therefore submit this brief in order to refute any claim that the Constitution mandates adoption of the substituted judgment doctrine.

The parties to the present case have consented to the filing of this brief. Letters granting consent are being submitted with this brief.

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THAD C. McCANSE, Guardian ad litem, - - - - Respondent.

INTRODUCTION

Petitioners have asked this Court: 1) to discover an unwritten, federal constitutional right to refuse medical treatment; 2) to declare this new unwritten federal right to be fundamental; 3) to extend application of this new-found right to the refusal of safe, painless, routine, nonburdensome, and effective procedures that are necessary to sustain life; 4) to hold that the provision, through tubes, of food and fluids is a form of medical treatment and not simply basic human care; and, 5) to hold that all countervailing state interests — in preserving life and the value of life; in preventing suicide, assisted suicide, euthanasia, and homicide; in preserving or restoring the moral integrity of the medical profession; in safeguarding the rights of conscience of objecting medical personnel and institutions; in protecting dependent or otherwise interested third parties; and in upholding the rights to life and equal protection of disabled persons — must yield to the unreviewable exercise of this new personal right.

This Court need undertake no such formidable substantive due process steeplechase, however. On the facts of the present case, the asserted right is simply not at issue: Nancy Cruzan is indisputably incompetent to exercise any "right" to refuse necessary food and water.

Being unable to make any decisions for herself, Nancy Cruzan — like an infant or any other incompetent person — must necessarily rely upon others to provide for her basic needs. She cannot make any decisions or exercise any personal rights regarding her care and treatment. Petitioners nevertheless claim that the Constitution requires Missouri, under the doctrine of substituted judgment, to assign to petitioners Nancy Cruzan's alleged personal power to refuse tube feeding and fluids. Thus, the issue in this case is whether the Constitution requires a state to adopt the substituted judgment doctrine in order to authorize the caretakers of an incompetent person to choose death for their ward by denying her food and water.

The Constitution does not impose upon the states any requirement that they subject incompetent persons to the controversial and seriously flawed doctrine of substituted judgment. This Court should therefore affirm the judgment of the Supreme Court of Missouri.

SUMMARY OF ARGUMENT

Nancy Cruzan, as an incompetent person, lacks the capacity to make autonomous personal choices. She must therefore rely upon others to make decisions that are in her best interests.

Petitioners argue, however, that the Constitution requires a state to assign to guardians the personal decisionmaking power of persons who are incompetent. Neither the due process clause nor the equal protection guarantee of the fourteenth amendment, however, compel a state to implement any such substituted judgment mechanism. Furthermore, the doctrine of substituted judgment actually threatens the genuine rights and interests of incompetent persons.

There is no substantive due process requirement that a state adopt the substituted judgment doctrine. The inability of an incompetent person to make a decision is a fact of reality, not a consequence of state action. States face no constitutional obligation affirmatively

to remove natural obstacles to the exercise of rights. The substituted judgment doctrine, moreover, is actually inimical to the rights of incompetent persons. The doctrine is incoherent in theory, unworkable in practice, and destructive of the legal safeguards necessary to protect incompetent persons against manipulation and abuse.

Nor does the equal protection guarantee compel a state to establish a substituted judgment mechanism. The inability of incompetent persons to make decisions is neither a consequence of official discrimination nor a factor that states are obligated to disregard. On the contrary, ignoring the special needs of incompetent persons exposes them to abusive and discriminatory treatment.

ARGUMENT

Petitioners concede that Nancy Cruzan lacks the capacity to make any decisions about her care. Brief for Petitioners at 22 ("There is no question that Nancy Cruzan cannot state today what her wishes are"). Yet petitioners predicate their entire constitutional claim upon Nancy's alleged fundamental federal right to *choose* not to receive certain care or medical treatment. *Id.* at 14 ("right of Nancy Cruzan, an incompetent person, to refuse unwanted medical treatment"). This claim, by definition, must fail.

Petitioners attempt to avoid this obvious and fatal defect in their claim by arguing that this "right to choose" exists in the abstract, independent of the one who chooses. Petitioners argue further that the Constitution *requires* that third parties — in this case, the petitioner guardians — exercise this disembodied "right to choose." In short, petitioners would have this Court hold that the Constitution compels states to adopt the controversial and gravely flawed doctrine of "substituted judgment," whereby third parties assume the power to exercise the personal decisional rights of those who are incompetent to make decisions for themselves.

The Constitution imposes no such requirement on the states. Neither due process nor equal protection compels use of the doctrine. Indeed, the substituted judgment doctrine suffers from major theoretical and practical difficulties, rendering the doctrine inimical to, rather than protective of, the rights and interests of incompetent persons.

THE FEDERAL CONSTITUTION DOES NOT REQUIRE STATES TO ADOPT THE SUBSTITUTED JUDGMENT DOCTRINE.

The Supreme Court of Missouri declined to apply the doctrine of substituted judgment in the present case. *Cruzan v. Harmon*, 760 S.W.2d 408, 424-26 (Mo. 1988). The United States Constitution does not require a contrary result.

Under the substituted judgment doctrine, a third party — whether a court, a guardian, a friend or family member, or some other person — assumes the power to make personal choices for an incompetent person. This third party is *not* required to act in the best interests of the incompetent person. [1] On the contrary, this third party exercises the power to choose with the same legal force and freedom that the incompetent person would have if he were the one actually making the decision. Thus, substituted judgment doctrine essentially alienates personal constitutional rights from someone who cannot exercise them, and assigns those rights to someone else who can.

Petitioners contend that the Constitution compels a state to implement some form of the substituted judgment doctrine. Brief for Petitioners at 22, 29. Neither due process nor equal protection, however, requires states to embrace this controversial doctrine. [2] On the contrary, the substituted judgment doctrine is antithetical to the genuine rights and interests of incompetent persons.

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[1] *See, e.g., In re Guardianship of Roe*, 383 Mass. 415, ___ n.20, 421 N.E.2d 40, 59 n.20 (1981) (citation omitted):

> If the judge feels that the "best interests" of the ward demand one outcome but concludes that the ward's substituted judgment would require another, then, in the absence of an overridding State interest, the substituted judgment prevails. In short, if an individual would, if competent, make an unwise or foolish decision, the judge must respect that decision as long as he would accept the same decision if made by a competent individual in the same circumstances.

[2] Both courts and commentators have sharply criticized the substituted judgment doctrine. *See, e.g., In re Guardianship of Eberhardy*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981); *In re Storar*, 52 N.Y.2d 363, 380, 420 N.E.2d 64, 72-73, 438 N.Y.S.2d 266, 275, *cert. denied*, 454 U.S. 858 (1981); *In re Conservatorship of Valerie N.*, 40 Cal. 3d 143, 184-89, 219 Cal. Rptr. 387, 415-18, 707 P.2d 760, 788-91 (1985) (Bird, C.J., dissenting); *id.* at 170-71, 219 Cal. Rptr. at 405-06, 707 P.2d at 778-79 (Lucas, J., concurring and dissenting); *In re Moe*, 385 Mass. 555, ___, 432 N.E.2d

(cont'd on next page)

A. Due Process Does Not Require States to Adopt the Substituted Judgment Doctrine.

The due process guarantee of the fourteenth amendment to the Constitution does not compel states to adopt the substituted judgment doctrine.

Petitioners contend that there is a fundamental right to refuse necessary tube feeding as a matter of substantive due process. Brief for Petitioners at 17-20. Petitioners argue further that due process requires recognition of "these long protected autonomy rights" for dependent, incompetent persons. *Id.* at 19-20. Petitioners then conclude that in order for "the fundamental rights of incompetent persons [to be] honored," *id.* at 16, the state must implement a substituted judgment mechanism for delegating the incompetent "individual's right to self-determination," *id.* at 18, to third parties who might act in a manner that reflects the "interests and values" of the incompetent person, *id.* at 19-20.

712, 724 (1982) (Nolan, J., dissenting); *In re Conroy*, 98 N.J. 321, ___ - ___, 486 A.2d 1209, 1229-31 (1985); *id.*, at ___, 486 A.2d at 1246 (Handler, J., concurring in part and dissenting in part); *In re Hamlin*, 102 Wash. 2d 810, ___, 689 P.2d 1372, 1381 (1984) (Rosellini, J., dissenting); *United States v. Charters*, 829 F.2d 479, 497-98 (4th Cir. 1987). *See generally* Weber, *Substituted Judgment Doctrine: A Critical Analysis*, 1 Issues L. & Med. 131 (1985); *see also* Case Note, *Live or Let Die; Who Decides an Incompetent's Fate?* In re Storar *and* In re Eichner, 1982 B.Y.U. L. Rev. 387; Ikuta, *Dying at the Right Time: A Critical Legal Theory Approach to Timing-of-Death Issues*, 5 Issues L. & Med. 3, 41-44 (1989); Destro, *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. Contemp. Health L. & Pol'y 71, 107-17 (1986); Dresser, *Life, Death and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 Ariz. L. Rev. 373 (1986); Robertson, Jr., *Is "Substituted Judgment" a Valid Legal Concept?*, 5 Issues L. & Med. 197 (1989); Price & Burt, *Sterilization, State Action, and the Concept of Consent*, 1 L. & Psychology Rev. 57 (1975); Schultz, Swartz & Appelbaum, *Deciding Right-to-Die Cases Involving Incompetent Patients*: Jones v. Saikewicz, 11 Suffolk U.L. Rev. 936 (1977); Gutheil & Appelbaum, *The Substituted Judgment Approach: Its Difficulties and Paradoxes in Mental Health Settings*, 13 L. Med. & Health Care 61 (1985); Note, In re Quinlan: *Defining the Basis for Terminating Life Support Under the Right to Privacy*, 12 Tulsa L.J. 150, 167 (1976); Note, *Equality for the Elderly Incompetent: A Proposal for Dignified Death*, 39 Stan. L. Rev. 689, 714 (1987); L. Tribe, *American Constitutional Law* § 15-11, at 1368 n.25, 1369 (2d ed. 1988).

This Court need not reach the question whether some (or all)[3] persons have a fundamental constitutional right to choose death by starvation and dehydration. In the case at bar there is no state action infringing upon any such "right." The inability of incompetent persons to exercise personal choices is a fact of reality, not a consequence of state action; hence, this inability cannot in itself constitute a denial of due process. Moreover, the due process clause does not require states to provide affirmative mechanisms to remove pre-existing obstacles to the exercise of rights when the state has not itself created those obstacles. Furthermore, limiting the power of third parties to choose in place of an incompetent person actually safeguards the rights of incompetent persons.

1. The inability of incompetent persons to choose is not a consequence of state action.

The fourteenth amendment protects people only against state action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982). The impairment of life, liberty, or property by private persons or by natural forces simply does not infringe any fourteenth amendment protections.

Incompetency is a fact of life for Nancy Cruzan. She lacks the capacity to exercise any personal rights to make decisions, not because of any state action, but because of the reality of her physical and mental condition.

Hence, Nancy Cruzan's inability to choose or reject feeding tubes does not even trigger due process concerns. Her incapacity to make any decision in this regard is no more a denial of her rights than is her incapacity to vote, to seek remarriage with her divorced husband, or to speak out on her favorite political issue.

Incompetent persons lack the ability to exercise rights that require a person to make choices. This is reality, not legal repression.

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[3] Petitioners suggest that this Court could recognize a starvation right limited to the "narrow class of patients" who are permanently unconscious. Brief for Petitioner at 27; *see also id.* at 15 ("a narrow ruling can resolve [this] case"). Such a limitation, however, would necessarily reflect a negative judicial assessment of the "quality of life" of the class of unconscious patients — an approach petitioners purport to oppose, *see id.* at 37-39. Thus, it is difficult to see how this starvation right could be limited in any principled fashion.

2. States have no affirmative constitutional obligation to provide a mechanism to overcome the inability of incompetent persons to make choices.

The guarantees of the fourteenth amendment "generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Services*, 109 S. Ct. 998, 1003 (1989) (citations omitted). *Accord Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border"). Thus, a state need not adopt a mechanism for implementing alleged personal choices on behalf of those unable to make such choices.

The refusal of the Missouri legislature and state supreme court to establish a substituted judgment mechanism for assigning to third parties any authority Nancy Cruzan may have to choose death by starvation does not violate the due process clause. This refusal "places no obstacle — absolute or otherwise — in the . . . path [of an incompetent person]." *Maher v. Roe*, 432 U.S. 464, 474 (1977). Nancy Cruzan "continues as before to be dependent" on others, *id.* — here, her caretakers — to safeguard her welfare.

Governmental bodies may at times elect to create mechanisms whereby past personal decisions, expressed with clarity and subject to rigid formalities, may receive implementation when the decision-maker is subsequently unable personally to carry out the personal choice. Wills, for example, allow people to provide in advance for the disposition of their property after their death; absentee ballots permit people to vote ahead of time when circumstances will prevent their attendance at polling places; so-called "living will" legislation affords people the opportunity to express their desires regarding their future care and medical treatment in the event of incompetency. All of these anticipatory choice mechanisms, however, require clear and specific expression of the relevant choices. Furthermore, states impose a variety of "rigid formalities" — writing requirements, oaths, witnesses, and so forth — upon the exercise of these mechanisms. This Court has never suggested that the imposition of these formal requirements somehow burdens the exercise of any constitu-

tional rights; indeed, this Court has never even held that the Constitution requires states to enact means for advance decisionmaking in the first place.

The Supreme Court of Missouri did not foreclose the possibility of making decisions for incompetent persons on the basis of formal advance arrangements or other clear and convincing evidence of prior intent. *See* 760 S.W.2d at 425. But the facts of the present case present no such situation. Attempts to divine Nancy Cruzan's prior intent rest entirely upon speculation and inference from occasional past remarks applied to present circumstantial considerations. *Id.* at 424. Such attenuated hypothesizing does not represent an adequate substitute for serious and explicit directives. Indeed, there would be a "grave risk if the law uniformly but unrealistically treated the expression of such sentiments as a calm and deliberate resolve to decline all life-sustaining medical assistance once the speaker is silenced by mental disability." *In re Westchester County Medical Center*, 72 N.Y.2d 517, 532, 531 N.E.2d 607, 614, 534 N.Y.S.2d 886, 893 (1988). Thus, even if constitutional concerns were to arise in the presence of clear and convincing prior expressions of a person's intentions, that issue is not before the Court. The Constitution plainly does not require states, in the absence of solid evidence of past intent, to create mechanisms for transferring personal decisionmaking authority to third persons in a supposed effort to "overcome" the obstacle of incompetency.[4]

3. Substituted judgment doctrine actually threatens, rather than safeguards, the rights and interests of incompetent persons secured under the due process clause.

The due process guarantees of the fourteenth amendment actually militate against adoption of the substituted judgment standard. While this Court need not now decide whether the due process clause actually *forbids* a state from exposing incompetent persons to the harmful consequences of the substituted judgment doctrine — such as the derogation of their best interests and the usurpation of their

[4] Furthermore, the substituted judgment doctrine fails, both in theory and in practice, to "overcome" the incompetency of the mentally disabled person. *See infra* § A(3)(a), (b).

personal decisional rights — these considerations clearly demonstrate that the fourteenth amendment does not *compel* a state to adopt this controversial doctrine.

Infants and other incompetent persons lack the capacity to make decisions for themselves. Society therefore imposes upon the caretakers of incompetent persons an obligation to act in the best interests of their wards.

When the state is the caretaker, this obligation acquires a constitutional dimension. *DeShaney*, 109 S.Ct. at 1004-06. In such situations, the responsibility to act in the best interests of the ward translates into a constitutional "duty to provide adequate food, shelter, clothing, and medical care. These are the essentials of the care that a State must provide." *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). *Accord Parham v. J.R.*, 442 U.S. 584, 616 (1979) (constitutional requirements satisfied when commitment process for children provides for decisions "in the best interests of the child").

In the present case, petitioners seek to deny to their ward, Nancy Cruzan, one of these "basic human needs," *DeShaney*, 109 S. Ct. at 1005, namely, adequate food and fluids, in order to deprive their ward of life itself.[5] Petitioners urge this Court to read the substituted judgment doctrine into the fourteenth amendment because this doctrine permits actions that conflict with the best interests of the incompetent person. As one court explained, "If the judge feels that the 'best interests' of the ward demand one outcome but concludes that the ward's substituted judgment would require another, then, in the absence of an overriding State interest, the substituted judgment prevails." *In re Guardianship of Roe*, 383 Mass. 415, ___ n.20, 421

[5] Semantics aside, it is plain that petitioners seek the death of Nancy Cruzan. Their claim rests, not upon any alleged burden of tube feeding, but upon the supposed undesirability of her life itself, given her present condition. *See, e.g.*, Brief for Petitioners at 15, 38 (asserting "fundamental constitutional right" to "reject" one's "existence" in a condition considered intolerable); *id.* at 5, 9, 33 (claiming Nancy would not want to continue living, given her present condition); *id.* at 35 (claiming decision below "sentences" most incompetent persons to life against their will). Petitioners object to tube feeding, not because it somehow hurts Nancy Cruzan, but *because it keeps her alive*.

N.E.2d 40, 59 n.20 (1981).[6]

Substituted judgment doctrine, however, threatens the rights and interests of incompetent persons under the fourteenth amendment precisely because it disregards, and therefore often defeats, the best interests of the incompetent ward. Moreover, the doctrine suffers from major difficulties both in theory and in practice, and increases the risk of abuse and exploitation of incompetent persons. This Court should therefore decline to constitutionalize the flawed doctrine of substituted judgment.

a. Substituted judgment doctrine is incoherent in theory.

Substituted judgment doctrine is inherently incoherent because it treats the actions and speculations of third parties as equivalent to the exercise of a personal, highly subjective decision by an incompetent individual.

While the limits and nature of substituted judgment vary somewhat from case to case, the approach essentially envisions a court or other surrogate as acting on behalf of an incompetent individual in the same manner as the incompetent person would if he were competent. *See, e.g., Strunk v. Strunk*, 445 S.W.2d 145, 147 (Ky. 1969). Thus if the question concerns the care and treatment of an incompetent person, substituted judgment doctrine asks what decision the patient would make if he were competent to choose. *E.g., Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (refusing chemotherapy on behalf of retarded man).

The key to this legal standard lies in the depiction of the issue as one of personal decisional rights — here, the "right" to refuse food and fluids. Under the best interests standard, a court (or guardian) clearly takes responsibility for any decision to be made concerning

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[6] *See* Annas, *Reconciling* Quinlan *and* Saikewicz: *Decision Making for the Terminally Ill Incompetent*, 4 Am. J.L. & Med. 367, 377 n.30 (1979):

> Probably the primary reason for adopting the "substituted judgment" over the "best interests" test . . . was that very good arguments can be mustered to demonstrate that continued treatment was actually in the best interests of [the patients]. To the extent that this is true, it is another example of the old adage that "hard cases make bad law."

the incompetent person: the court or guardian decides because the incompetent person cannot. In such circumstances, the "rights" of incompetent persons "are only meaningful as they are exercised by agents acting with the *best interests* of their principals in mind." *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2693 n.23 (1988) (emphasis added). This basic reality vanishes with substituted judgment, however, in favor of a powerful fiction: the incompetent person decides, and the court or other surrogate merely acts as a mouthpiece or interpreter. Suddenly all responsibility for the decision rests with the incompetent individual, and the court and litigants become blameless, choiceless assistants.[7] The court employing the substituted judgment standard, meanwhile, impairs its ability critically to examine that standard when it unquestioningly assumes that any such challenge would threaten the "rights" of the incompetent person. *See* Weber, *supra* note 2, at 137-38.

The critical theoretical flaw of substituted judgment, however, lies precisely herein: while the standard claims to preserve a purely personal right to decide, it delegates the decision to a third party — the court or some other surrogate. As courts and commentators have observed, "[t]his notion of substituted judgment is logically contradictory. Simply put, autonomy and self-determination refer to the individual's right to choose. If a third party, no matter how well-intentioned, makes a choice for that individual, the choice can no

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[7] The recent protestations of the Supreme Judicial Court of Maine typify this mentality: "In ruling to respect the personal choice [to refuse food and fluids] made by Gardner [an incompetent ward], therefore, *we judges do not ourselves* make an independent assessment of the value of life. . . . *We* are only recognizing and effectuating *his* right of self-determination." *In re Gardner*, 534 A.2d 947, 955 (Me. 1987) (emphasis added). The three dissenting judges pointed out that the evidence of Gardner's supposed prior preferences was "woefully inadequate," *id.* at 957 (Clifford, J., dissenting), and charged the majority with actually deciding the case "on the unarticulated notion that Joseph Gardner's life is not worth maintaining," *id. See* Robertson, Jr., *supra* note 2, at 207 ("No matter how strenuously one argues that the decision reached under substituted judgment is really the incompetent person's decision, the fact remains that it is a judge, or a group of judges, who make the decision based on their assessment of the incompetent person's values, supposed wishes, and prognosis").

longer be called autonomous." Ikuta, *supra* note 2, at 42 (footnote omitted). A substituted judgment "is clearly not a personal choice, and no amount of legal legerdemain can make it so." *In re Guardianship of Eberhardy*, 102 Wis. 2d 539, 566, 302 N.W.2d 881, 893 (1981). *See* Weber, *supra* note 2, at 138-41; *see also In re Westchester County Medical Center*, 72 N.Y.2d 517, 528, 531 N.E.2d 607, 612, 534 N.Y.S.2d 886, 891 (1988) ("the right to decline treatment is personal and [under New York law] could not be exercised by a third party when the patient is unable to do so") (citation and footnote omitted). The court below recognized this fundamental contradiction in terms: "It is logically inconsistent to claim that rights . . . which spring from concerns for personal autonomy can be exercised by another absent the most rigid of formalities." *Cruzan v. Harmon*, 760 S.W.2d 408, 425 (Mo. 1988) (en banc).

A comparison with other personal decisional rights is illustrative. The right to vote, for example, inheres in all adults by constitutional decree, *see* U.S. Const. amends. XV, XIX, XXVI; but the exercise of this right by another constitutes an abuse, indeed a crime, whether the first person be competent or incompetent, *see, e.g.*, Mo. Ann. Stat. § 115.631(4) (Vernon Supp. 1989) (election felonies include "[a]pplying for a ballot in the name of any other person, whether the name be that of a person living or dead or of a fictitious person").[8] Similarly, the delivery of a public speech, the writing and distribution of a pamphlet, and the selection or divorce of one's spouse, all involve rights whose essence consists in their strictly personal exercise. *See, e.g., Higginbotham v. Higginbotham*, 146 S.W.2d 856 (Mo. App. 1940) ("a suit for divorce is regarded as so strictly personal and volitional that it cannot be maintained at the pleasure of a guardian or committee of an insane spouse, even though the result is to render the marriage indissoluble by or on behalf of the insane party") (internal quotation marks and citation omitted), *cert. quashed, State ex rel. Higginbotham v. Hughes*, 348 Mo. 1073, 156 S.W.2d 650 (1941). *See generally* Annotation, *Power of Incompetent Spouse's Guardian, Committee, or Next Friend to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to Make a Compromise or Settlement in Such Suit*, 6 A.L.R.3d 681 (1966) (great

[8]It is, of course, no defense to argue that the person in whose guise the offender votes would have voted the same way.

majority of cases disallow divorce action by guardian).[9] *Cf.* Schultz, Swartz & Appelbaum, *supra* note 2, at 947 (discussing limitations on the decisionmaking power of guardians). Indeed, the very purpose of the declaration of such rights is to forestall their usurpation by third parties.

The same reasoning applies to the present case. The personal decision which substituted judgment doctrine seeks to implement in care and treatment cases, like the decision to seek a divorce or the decision to cast a vote,[10] does not lend itself to vicarious exercise. The decision to refuse care or medical treatment, where legally protected, represents an exercise of autonomous self-determination pursuant to a common law or constitutional right to privacy. Such privacy rights protect personal decisions against government intrusion, and thus judicial intervention to make decisions in the name of patient privacy is inherently contradictory.[11] Protection for privacy

[9]In *In re Marriage of Drews*, 139 Ill. App. 3d 763, 487 N.E.2d 1005 (1985), *aff'd*, 115 Ill. 2d 201, 503 N.E.2d 339 (1986), *appeal dismissed and cert. denied*, 483 U.S. 1001 (1987), the Illinois court of appeals specifically declined to "adopt decisions of other states which recognize that the guardian possesses the authority to make certian 'personal' decisions on behalf of the ward based upon the doctrine of substituted judgment, and extend application of the doctrine to the context of marriage dissolution proceedings." 139 Ill. App. 3d at ___, 487 N.E.2d at 1013.

[10]Missouri specifically provides that "no person who is adjudged incapacitated [i.e., incompetent] shall be entitled to register or vote." Mo. Ann. Stat. § 115.133.2 (Vernon Supp. 1989). Under petitioners' theory of a constitutional right to substituted decisionmaking, this statute would be clearly unconstitutional.

[11] *See* Weber, *supra* note 2, at 138-40; Schultz, Swartz & Appelbaum, *supra* note 2, at 956 ("The incompetent necessarily has to have a decision made for him. Thus, the most fundamental interest encompassed by the right to privacy is not involved in these [cases]"); Robertson, Jr., *supra* note 2, at 206 ("the notion that a court or any third person can decide for the incompetent person under a theory of substituted judgment denies the very autonomy from which the doctrine takes its life"); Note, In re Quinlan: *Defining the Basis for Terminating Life Support Under the Right to Privacy*, 12 Tulsa L.J. 150, 167 (1976) ("The patient's right of privacy provides a zone of protection for the exercise of choice by the patient. The judicially sanctioned entrance of third parties into this zone is not justified by the privacy rationale"). *See also In re Guardianship of Eberhardy*, 102 Wis. 2d 539, 565-66, 302 N.W.2d 881, 893 (1981) ("we find it somewhat

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ensures, not that a decision *be made*, but rather that the *individual* be free *personally* to choose or not to choose some course of action.

The requirement of strictly personal exercise of decisional rights has special significance for incompetent individuals: being unable to decide, they cannot contest decisions made in their behalf. *See Cruzan*, 760 S.W.2d at 416 (substituted decisionmakers acquire "unbridled" power "given the patient's inability to voice objection") (footnote omitted). Moreover, the notion of third party exercise of personal rights knows no bounds: anything a competent person may do in the exercise of protected rights, no matter how "unwise or foolish," *see Guardianship of Roe*, 383 Mass. at ___ n.20, 421 N.E.2d at 59 n.20, an incompetent might be "substitute judged" to do — whether it be the noble donation of an organ, *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969), or the self-mutilation of sterilization, *In re Moe*, 385 Mass. 555, 432 N.E.2d 712 (1982). Furthermore, with the decriminalization of suicide comes the possibility that society's unwanted will be "allowed" the exercise of their "rights" in this area, leading to the euthanasia of incompetent persons. *See* R. Burt, *Taking Care of Strangers* 170 (1979).

This is not to say that incompetent people should not have or do not have any rights. "But it is not enough to say that an incompetent person has rights. Courts exist to protect not rights, but the rights of persons. Courts must, therefore, draw distinctions between rights that attach to all persons passively and those that require an active choice." Robertson, Jr., *supra* note 2, at 213.[12] This Court has

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too facile when discussing the right of privacy, which by definition necessarily refers to the person involved, to find that there is a genuine choice when that choice cannot be personally exercisable").

[12] The problem arises, not from the recognition of rights for incompetent persons, but from the abuse of personal decisional rights. Courts need to recognize that while incompetent individuals have rights, some simply cannot be exercised. *In re Jennings*, 198 N.J. Super. 55, 59, 453 A.2d 572, 574 (Ch. Div. 1981) (denying divorce action on behalf of incompetent ward) ("Lawrence Jennings alone has the right to make this decision. The unfortunate fact that he lacks, and will always lack, the capacity to make it does not justify delegating that decision to someone else"). The incompetency of the ward represents reality, not legal injustice. *See supra* § A(1). Hence, any judicial effort to superimpose the intelligent exercise of decisional rights is misconceived. *See Jennings*, 198 N.J. Su-

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already acknowledged as much:

> The law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain "rights," to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind. . . . It is in this way that paternalism bears a beneficent face, paternalism in the sense of caring, nurturing parent making decisions on behalf of a child who is not quite ready to take on the full rational and considered task of shaping his or her own life. . . . *[W]e act in their interest by restricting certain choices* that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions.

Thompson v. Oklahoma, 108 S. Ct. 2687, 2693 n.23 (1988) (plurality opinion) (emphasis added). It would be most "ironic," as the *Thompson* plurality observed, to decide this case on the basis of a rationale "that takes as its predicate the existence of a fully rational, choosing agent," *id.* Yet that is precisely what petitioners urge this Court to do when they assert a "right to choose" on behalf of one who cannot choose.

The law accommodates the incapacity of the incompetent person by providing, for example, that contracts made by incompetent individuals are voidable. *E.g.*, Mo. Ann. Stat. § 475.345 (Vernon Supp. 1989). *See generally* 41 Am. Jur. 2d *Incompetent Persons* 66 (1968). These contracts are not binding until ratified by a competent person, not because the incompetent person has no right to contract, but because the state seeks to protect the exercise of this right against abuse by others. When incompetent, an individual may more easily succumb to external influences which the law considers coercive or

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per. at 63, 453 A.2d at 576:

> In some respects, this case turns more on the limitations of judicial power than upon other concepts. There are many real problems, many sad problems, confronting the parties in this case. Most of those problems simply are not susceptible to being resolved by legal decisions rendered by a judge. Courts are increasingly asked to come up with solutions to intractable personal and social problems. Sometimes the best thing a judge can do is admit his inability to help.

manipulative; hence, the law applies strict safeguards to the exercise of rights by incompetent persons.

Substituted judgment disposes of these precautionary measures by creating a fiction whereby a person, though incompetent to make decisions, somehow retains full decisionmaking powers. "By cloaking [the relevant] choices with such honored labels as self-determination, privacy, dignity, and bodily integrity, [substitute decisionmaking] standards allow incompetent patients' genuine interests to be quietly and conveniently subordinated to the interest of others." Dresser, *supra* note 2, at 390 (footnote omitted).

A court applying the substituted judgment doctrine superimposes upon the incompetent person a substitute decision constructed from the suggestions and speculations of third parties. These third parties, however, are precisely those people against whose potentially undue influence the law of incompetent persons establishes safeguards. Hence, substituted judgment doctrine turns the law governing incompetent persons on its head. *See* Weber, *supra* note 2, at 141.

b. Substituted judgment doctrine is unworkable in practice.

In addition to its theoretical incoherency, substituted judgment doctrine suffers from grave practical difficulties. A whole set of problems arises from the simple attempt to put the standard into operation. Weber, *supra* note 2, at 141-47; Ikuta, *supra* note 2, at 42-44. These problems center around the ascertainment of the incompetent ward's intent, an intent which is by definition unknowable. Because "the condition of an incompetent patient makes it impossible to ascertain definitively his present desires," *In re Conroy*, 98 N.J. 321, ___, 486 A.2d 1209, 1229 (1985), "we can never be completely certain" what the patient would want when "the patient is no longer able to express his or her wishes," *In re Westchester County Medical Center*, 72 N.Y.2d at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892. Thus, substituted judgment involves the "impossible task of weighing the importance an incompetent person places on such values as life, pain, and security." Schultz, Swartz & Appelbaum, *supra* note 2, at 944.

Courts have attempted to simplify the task of discovering the incompetent person's would-be intent by adopting an apparently

straightforward assumption: what the person decided, or would have decided, before, corresponds to what the person would decide now. [13] Where, for example, an individual previously considered a specific medical treatment question, and clear and convincing evidence of the person's prior thoughtful and serious resolution appears, the court would apply this prior resolution to the decision at hand. *See Westchester County Medical Center*, 72 N.Y.2d at 528-33, 531 N.E.2d at 611-14, 534 N.Y.S.2d at 891-93.

Such strong evidence as solemn and specific prior statements only rarely appears in these cases, however. Moreover, if the patient's situation at all varies from the hypothetical situation he had discussed earlier, the court must consider the importance of this variation. *See id.* at 530, 532-33, 531 N.E.2d at 613, 614-15, 534 N.Y.S.2d at 892, 893-94.

In the present case, little of the evidence introduced at trial has any real value in divining the prior wishes of Nancy Cruzan with respect to the specific question of refusing food and water. Her alleged prior comments are nothing more than vague generalities, and the sole evidentiary basis for a substituted judgment would in reality be the personal speculations of third parties as to what Nancy Cruzan might have wanted. None of the proffered evidence indicates how circumstances — age, health, and factors not necessarily foreseeable to Nancy Cruzan — might have affected her decision.

Such evidentiary difficulties are inherent in efforts to ascertain an incompetent person's intent. *E.g., Westchester County Medical Center*. These difficulties reflect a fundamental problem: courts simply cannot attribute a legally conclusive intent to an incompetent person without deriving that intent from sources external to the incompetent individual. As one court observed, "in the absence of adequate proof of the patient's wishes, it is naive to pretend that the right to self-determination serves as the basis for substituted decisionmaking." *Conroy*, 98 N.J. at ___, 486 A.2d at 1231 (citations omitted). Substituted judgment requires the court to piece together testimony from relatives and acquaintances to construct a *persona* who then represents and decides for the incompetent person. The

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[13] This assumption is highly questionable. *See* Dresser, *supra* note 2, at 379-82.

entire endeavor operates more as an exercise in fictional characterization than as an enhancement of anyone's rights. [14]

The underlying problem of perspective further complicates the task of reconstructing the mind of the incompetent person. No one can entirely exclude his own distinct perspective while attempting to adopt the incompetent person's point of view. Handicaps, for example, can scarcely ever (if at all) be perceived equally by those who bear them and by third parties. [15] Even the person who acquires the handicap may undergo a significant change in perspective. Many a person has imagined that death would be preferable to a certain illness, deformity, or disability, only to find an unsuspected capacity to deal with the handicap when it eventuates. *See Ross v. Hilltop Rehab. Hosp.*, 676 F. Supp. 1528, 1533, 1542 (D. Colo. 1987) (noting that "severely disabled patients at Hilltop" had "expressed grief and frustration and indicated a preference to die" by means of "termination of treatment, but all had eventually changed their minds and had come to terms with their situations"). A substituted judgment thus entails the application of past intents which, even when expressed with solemnity, may no longer be appropriate. In other words, substituted judgment doctrine assumes that people never change their minds. Yet prior statements are of limited value precisely because "human beings are incapable of perfect foresight" and "there always exists the possibility that, despite his or her clear expressions in the past, the patient has since changed his or her mind." *Westchester County Medical Center*, 72 N.Y.2d at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892. Thus, standards based upon the prior preferences of persons who are now incompetent "can be challenged on the grounds that a person's interests can change radically over time," and this

[14] Weber, *supra* note 2, at 146. Another commentator called the substituted judgment doctrine an "invention from fantasyland." Annas, *Quality of Life in the Courts: Earle Spring in Fantasyland*, Hastings Center Rep., Aug. 1980, at 9, 10.

[15] A genetic counselor, for example, was "startled" to find that "'[t]he congenitally blind don't regard it as all that much of a handicap'" and were not particularly concerned about blindness in their children. Wingerson, *Genetic Twilight*, Sci. Dig., June 1983, at 98, 99. *See also* Schultz, Swartz & Appelbaum, *supra* note 2, at 946 (handicaps appear differently to handicapped.)

concern is "most troubling when an incompetent patient's present interests differ from those protected by his previous expressions." Dresser, *supra* note 2, at 379-82.

c. Substituted judgment doctrine facilitates the abuse of incompetent persons.

The substantial practical and theoretical problems associated with the substituted judgment doctrine gain magnified significance in the pressured context of a life-or-death situation. A heavy emotional overlay, conflicting motives, and the basic tension of a confrontation with death all beleaguer the participants in litigation and make the need for a carefully chosen legal standard especially important. *See In re Guardianship of Eberhardy,* 102 Wis. 2d 539, 569, 307 N.W.2d 881, 895 (1981) (refusing to authorize sterilization of retarded woman) ("the exercise of judicial discretion unguided by well thought-out policy determinations reflecting the interest of society, as well as the [incompetent person], [is] hazardous indeed"); *see generally* R. Burt, *Taking Care of Strangers* (1979); Weber, *supra* note 2, at 147-48.

These contextual pressures pose a very real threat to the incompetent person, since the litigation contains a systematic bias against care or treatment: incompetent individuals cannot by themselves litigate their medical care, and caretakers who do not strongly desire the withholding of beneficial care will not bring an action. Hence, only those incompetent persons whose death accords with the interests of the litigant will appear before a tribunal. Weber, *supra* note 2, at 148.

Litigated questions of care and treatment, then, arise in an atmosphere not of concerned, impartial inquiry, but rather of pervasive (if covert) antagonism toward the incompetent person. [16] In this

[16] Sometimes a court will make an especially frank admission. One judge, for example, was explicit: "I think it is fair to say that everyone involved in this case wishes that this poor woman would die." *In re Conroy*, 188 N.J. Super. 523, 526, 457 A.2d 1232, 1234 (Ch. Div. 1983) (authorizing removal of nasogastric feeding tube), *rev'd,* 190 N.J. Super. 453, 464 A.2d 303 (App. Div. 1983), *rev'd*, 98 N.J. 321, 486 A.2d 1209 (1985).

Litigants may be expected in most cases to deny a desire for the death of the incompetent, and to focus instead on the undesirability of the specific treatment in dispute. But they must understand the probable consequence of withholding care or treatment — otherwise there would be no need to seek advance legal immunity.

context, the need for special safeguards becomes critical. [17]

Recognition of the dangers inevitably surrounding life-or-death treatment decisions for incompetent persons gives a new perspective on substituted judgment doctrine. The standard appears as a means, not of effectuating the incompetent individual's personal choices, but of enabling "those who seek the death of a ward, to meet the end sought." *Cruzan*, 760 S.W.2d at 413 (footnote omitted). Substituted judgment doctrine employs the language of rights. If any right is vindicated, however, it is the right of the caretaker to choose death for the incompetent ward. *In re Conservatorship of Valerie N.*, 40 Cal. 3d 143, 171, 219 Cal. Rptr. 387, 406, 707 P.2d 760, 779 (1985) (Lucas, J., dissenting) ("I wonder whether the 'rights' which we are 'protecting' are in fact more likely to become those of the incompetent's caretaker"). [18]

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[17] Still another problem arises from the involvement of the court in two potentially conflicting roles: agent for the incompetent person, and judge of the legal permissibility of the incompetent person's substituted decision. "In a substituted judgement proceeding, the judge steps into the shoes of the incompetent, tries to see everything the incompetent would see, know everything the incompetent would know, and reach the decision the incompetent would reach." *Commonwealth v. DelVerde*, 398 Mass. 288, 299-300, 496 N.E.2d 1357, 1364 (1986). The judge must then step back and assume the role of neutral adjudicator, weighing the substituted decision against the competing interests of the state. *Id.* at 300, 496 N.E.2d at 1364. Neutrality, however, is most unlikely in such a situation. As the Supreme Judicial Court of Massachusetts observed in the context of plea bargaining for incompetent persons, "the judge cannot be expected to discharge these functions with dispassion if he has, in effect, become a party to the . . . process by stepping into [the incompetent person's] shoes to determine [that person's] substituted judgment." *DelVerde*, 398 Mass. at 300, 496 N.E.2d at 1365. Having first determined what choice the incompetent person would make, "the judge — acting as judge — would be hard-pressed to exercise independent judgment" in allowing or disallowing that choice. *Id.* at 300 n.9, 496 N.E.2d at 1365 n.9.

[18] Hence the attractive rhetoric of the substituted judgment doctrine becomes itself dangerous: with the death of incompetent persons phrased in the esthetic terminology of rights, pressures may easily increase for the exercise of these "rights." A family that feels a heavy financial or emotional burden in caring for an incompetent person, for example, no longer rests upon the firm support of the law. Instead, a legal option appears before their eyes offering both removal of the burden and moral justification. The family that would never dream of harming old Aunt Matilda now seriously consid-

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The fundamental defect of substituted judgment doctrine, then, is that it claims to be something other than it is. Its attractive language proclaims the vindication of important personal rights, but in operation it serves as merely another method of deciding what to do with helpless incompetent persons. The appealing rhetoric makes it an especially potent legal instrument; meanwhile, this same rhetoric largely shields the outcome from criticism.

It has been argued that flaws in rhetoric need not hinder the decision of a case, since the result is more important than the reasoning behind it. But the rationale matters a great deal, since its effect outlives the individual result. The danger is not only that the case formulating a specific theory will turn out improperly, but also that future opinions will borrow ambiguous or deceptive language to create a whole new line of cases. *See generally* Destro, *supra* note 2, at 90-96 (noting case-by-case process of eroding existing legal principles and introducing new, opposing principles). In precisely this fashion the substituted judgment standard evolved, beginning in one case with language added, almost as an afterthought, to demonstrate the reasonableness of the result, *see Ex parte Whitbread in re Hinde, a Lunatic*, 35 Eng. Rep. 878 (1816) (concerning allowances from the estate of an incompetent person), and ultimately developing in some jurisdictions into a central principle of decisionmaking, *see Guardianship of Roe*, 383 Mass. at ___, 421 N.E.2d at 51. *See generally* Weber, *supra* note 2, at 135-37. The doctrine remains theoretically unbounded, and thus may in the future grow into an even more potent instrument for controlling the lives and deaths of incompetent persons. *Commonwealth v. DelVerde*, 398 Mass. 288,

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ers allowing her the exercise of her "right" to discontinue nasogastric feeding: the family is free of her, her "rights" are vindicated, and she starves to a legally protected death. There may also arise special pressures on institutional caretakers to dispatch incompetent persons in order to trim budgets or preclude damage suits for the violation of substituted judgment rights. *See, e.g., Estate of Leach v. Shapiro*, 13 Ohio App. 3d 393, 469 N.E.2d 1047 (1984) (recognizing cause of action for "wrongfully placing and maintaining [an incompetent] patient on life-support systems").

These pressures need not only bear down upon the caretakers of incompetent persons. Competent individuals suffering disabilities may themselves feel subtle and not-so-subtle promptings to exercise their "rights." *See, e.g.*, R. Burt, *Taking Care of Strangers* 15-20 (1979). *See also Going Gentle into that Good Night*, *Time*, March 21, 1983, at 85 (noting pressure for sick and elderly to commit suicide).

296, 496 N.E.2d 1357, 1362 (1986) (declining to extend substituted judgment doctrine to plea bargaining on behalf of incompetent defendants) ("On general principles, it may be appropriate to use the procedure any time that an incompetent person risks denial of a fundamental right simply because he is unable to make or express a decision"). *See also* Note, *The Substituted Judgment Doctrine Expands Beyond Life-Prolonging Decisions*, 5 W. New Eng. L. Rev. 565, 585-86 (1983) (noting virtual limitlessness of potential for applying substituted judgment doctrine).

Substituted judgment doctrine claims to enhance human dignity and freedom. But the permissive death of incompetent individuals could just as readily appear as degrading and oppressive to a whole category of human beings (and indirectly, to all human beings). Indeed, the substituted judgment doctrine actually jeopardizes the concerns of incompetent individuals.

Personal concerns for the incompetent person include the advancement of his best interests and the defense of his well-being in the face of threatened harm, as well as the preservation of personal rights. Substituted judgment doctrine places primary emphasis upon the last of these. Since substituted judgment exalts the incompetent person's putative wishes over his best interests, the doctrine allows for decisions contrary to these best interests. Likewise, to the extent that a competent individual may choose to subject himself to harm or death,[19] the doctrine permits surrogate decisionmakers to choose the

[19] Third parties may actually have *greater* power to make harmful decisions for incompetent persons than competent persons have to make such decisions for themselves. Thus, for example, courts have refused to allow competent prison inmates any "right" to fast to death by refusing food and water. *E.g., In re Caulk*, 125 N.H. 206, 480 A.2d 93 (1984); *State ex rel. White v. Narick*, 292 S.E.2d 54 (W. Va. 1982). These cases may simply reflect the proposition that prisoners, being in government care and custody, face greater limitations on their ability to choose for themselves. Incompetent wards of the state, however, occupy an analogous position of dependence. It is therefore more likely that the real distinguishing factor is the physical or mental disability of the person for whom starvation is proposed. Thus, while no court has upheld the right of a healthy individual to choose death by starvation, courts have authorized the starvation and dehydration of gravely disabled persons, whether incompetent, *e.g., Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986), or competent, *e.g., Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986).

same for an incompetent person. Thus, substituted judgment offers no particular protection for the interests or the well-being of incompetent persons.

Nor does the standard offer support for the personal rights of the incompetent individual. Given the impossibility of determining the present wishes of an incompetent person, "a third party acting on the patient's behalf often cannot say with confidence that his treatment decision for the patient will further rather than frustrate the patient's right to control his own body." *Conroy*, 98 N.J. at ___, 486 A.2d at 1229 (citation omitted). Substituted judgment doctrine does claim to offer effective, indeed unique protection for these rights. But as noted above, the will of the incompetent person is both practically and theoretically inscrutable, and the unthinking, literal application of decisional rights to incompetent persons is simultaneously inappropriate and unfaithful to the content of these rights. Indeed, the attention paid to these illusory "rights" masks the actual degradation of the incompetent person's rights to life and equal protection. (Substituted judgment doctrine singles out incompetent individuals for officially sanctioned, involuntary death.)

Probing scrutiny of the substituted judgment doctrine, then, reveals it to be a deceptive device allowing for the exploitation of incompetent dependents. The doctrine offers false benefits and hidden harms, and rests on a specious theoretical base. It is unworkable in practice and exposes incompetent individuals to abuse and exploitation. This Court should reject the substituted judgment standard as a dangerous sham.[20]

[20] "Under no circumstances should a court consider such subjective factors as the quality of a person's life or speculate as to what the patient would want if he had the capacity to choose." Schultz, Swartz & Appelbaum, *supra* note 2, at 949. *See also In re Westchester County Medical Center*, 72 N.Y.2d at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892 ("the so-called 'substituted judgment' approach . . . remains unacceptable because it is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another").

For an especially macabre application of the substituted judgment approach, see the following account:

> Joseph Goebbels, loyal to the end, . . . on the evening of May 1[, 1945] had his six children — ages twelve to three — poisoned by lethal injections . . . . The children had not been asked to decide for

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B. Equal Protection Does Not Require States to Adopt the Substituted Judgment Doctrine.

The equal protection guarantee of the fourteenth amendment to the Constitution does not compel states to adopt the substituted judgment doctrine.

Petitioners include, at the end of their brief, a half-hearted argument that the equal protection clause requires a substituted judgment mechanism for assigning the personal decisionmaking authority of incompetent persons to third parties. Brief for Petitioners at 41-42.[21] This argument is without merit.

1. The refusal to adopt the substituted judgment doctrine does not discriminate against incompetent persons.

In the first place, the refusal to adopt a substituted judgment mechanism does not constitute discrimination against incompetent persons. The inability of such persons to take part in the direction of their care and treatment flows from their physical and mental handicaps, and not from any state action. Inequality in natural endowments does not translate into unequal protection of law.

2. Incompetent persons differ from competent persons in material respects relevant to the exercise of decisional rights.

Secondly, incompetent persons differ from competent persons precisely in their capacity (or lack thereof) to make the relevant decision. The state does not face a constitutional requirement affirmatively to disregard this important characteristic of incompetent persons.

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themselves. "They were too young" for that, Goebbels had written in a brief "Appendix" to Hitler's testament. "If they were old enough they would unreservedly agree with this decision."
2 W. Shirer, *20th Century Journey* 630 (1984).

[21] Petitioners attempt to review the decision of the Supreme Court of Missouri under the equal protection standards governing review of legislative actions. *Id.* at 41. This may not make sense — a judicial decision will always apply to a specific controversy, and thus necessarily have a limited and selective impact. Equal protection considerations do certainly have bearing, however, on the broader rationale and principles a court employs in reaching a particular decision.

"The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (citation omitted). It follows that "where individuals in the group affected by the law have distinguishing characteristics relevant to interests the state has the authority to implement, . . . the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id.* at 441-42.

Here petitioners object, not to a particular statute, but to the *absence* of a statute or judicial decision creating an affirmative mechanism for circumventing the differences between competent and incompetent individuals.[22] A state, however, is under no constitutional compulsion to ignore the obvious fact that incompetent persons, like retarded individuals, "have a reduced ability to cope with and function in the everyday world." *Id.* at 442. The state need not pretend that these "real and undeniable differences," *id.* at 444, do not exist; nor need the state disregard "the need for at least some restrictions that would not be imposed on others," *id.* at 445 (footnote omitted). *Accord Thompson v. Oklahoma*, 108 S. Ct. 2687, 2693 (1988) (plurality opinion) (noting multitude of legal restrictions on children under age sixteen); *Ginsburg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (state "may permissibly determine" that children lack "that full capacity for individual choice which is the presupposition of First Amendment guarantees"; upon this premise, the state "may deprive children of other rights — the right to marry, for example, or the right to vote — deprivations that would be constitutionally intolerable for adults") (footnote omitted).

3. The substituted judgment doctrine actually discriminates against incompetent persons.

Thirdly, the substituted judgment doctrine actually discriminates against incompetent persons by denying protection for their rights and interests.

Substituted judgment, as discussed above, *see supra* § A(3)(a), assigns to third parties certain powers over the incompetent person that would otherwise be inalienably personal. Substituted refusals of

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[22] As discussed *supra* § A(3)(a), (b), the substituted judgment doctrine fails in the attempt to overcome the inherent inability of incompetent persons to make a choice.

feeding and hydration, like arranged marriages for infants, put words in the mouths of those who cannot legally speak for themselves. Normally the law protects these persons, with the concept of incompetency, from making binding decisions that might compromise their rights and interests. Substituted judgment doctrine, however, abolishes these safeguards and simply transfers one person's "autonomy" to someone else.

Thus, substituted judgment simultaneously denies to incompetent persons the legal protections they need and exposes them to the abusive and discriminatory treatment of others.

Several members of this Court have already observed the ease with which life-and-death treatment decisions for incompetent persons can become vehicles for deadly discrimination. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 658-61 (1986) (White, J., joined by Brennan and O'Connor, JJ., dissenting) (noting that "discrimination against a handicapped infant may assume [various] guises," including subtle influences by physicians or hospitals on parental treatment decisions).

The case at bar presents precisely such an instance of discrimination. There can be no question that petitioners seek the removal of Nancy Cruzan's feeding tube, and thus her death, because of her gravely impaired condition. "In this case, the [provision of food and fluids] is completely unrelated to the [incompetent person's] handicapping condition. If an otherwise normal [person] would be given the identical [care], so should the handicapped [person] if discrimination on the basis of handicap is to be avoided." *Id.* at 655 (White, J., dissenting).[23]

Substituted judgment doctrine is also discriminatory because it

[23] Petitioners concede that the starvation of Nancy Cruzan would be based on her perceived "quality of life," but claim that this would be private discrimination and thus not offensive to any constitutional guarantees. Brief for Petitioners at 37-38. Yet the state necessarily will become entangled in discriminatory "quality of life" criteria unless it defers completely to the decisions of private caretakers, granting them unlimited authority for the starvation of all wards. Furthermore, the state may not necessarily "avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Cleburne*, 473 U.S. at 448 (internal quotation marks and citation omitted).

forces incompetent people to "make" a choice. Competent people face no legal compulsion to exercise a given personal decisional right. A person may vote for candidate A, vote for candidate B, or not vote. A person may marry M, marry N, or not marry. A person may choose treatment alternative X, choose treatment alternative Y, or refuse to decide and leave it to the doctor's best judgment. Substituted judgment, by contrast, requires that a decision be made, and at the instigation of third parties, even when the person affected most by the decision has made no formal or clear and convincing expression of intent. This unequal treatment of competent and incompetent persons is both discriminatory and inimical to the very nature of strictly personal decisions.

CONCLUSION

Nancy Cruzan is incompetent, and others necessarily will have to arrange for, and (when needed) provide consents for, the care and treatment that is in her best interests. This basic reality should not give way to misguided and ultimately futile efforts to exercise, by judicial ventriloquism, personal decisional rights she cannot now exercise.

The Constitution does not require states to adopt a substituted judgment mechanism to assign to third parties the strictly personal decisionmaking authority of those who are currently incompetent. Petitioners' claim that guardians have a constitutional right to exercise the supposedly autonomous authority of an incompetent person to choose death by starvation and dehydration must accordingly fail.

This Court should affirm the judgment of the Supreme Court of Missouri.

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